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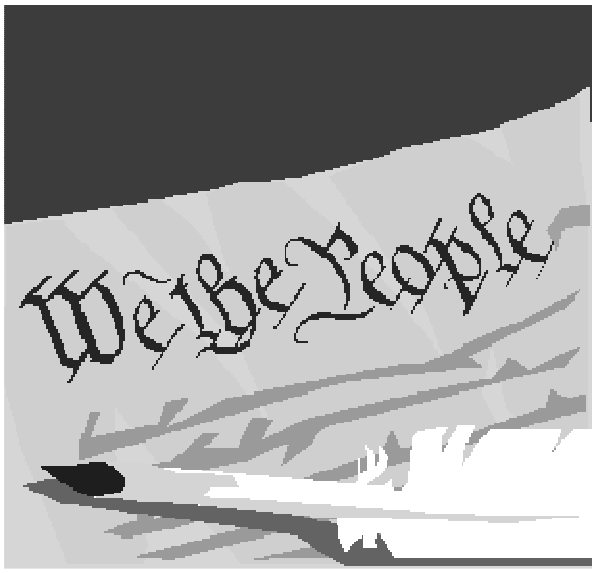

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Municipal & Supervisory Liability

Brown v. Bryan County, Oklahoma, 219 F.3d 450 (5th Cir. 2000)

Todd and Jill Brown were driving their pickup truck from Texas into Oklahoma in the early morning hours when they noticed a police roadblock. Todd decided to turn around, and executed a 180° turn, which drew the attention of the officers who engaged the Browns in a pursuit. Burns, a reserve officer, pulled Mrs. Brown from the vehicle, spun her to the ground, applying an arm bar hold. Mrs. Brown suffered severe knee injuries. Burns, who was 21 years old, had been on the force for a matter of weeks, had no experience in law enforcement and his educational background consisted of a few semesters of college. It appears as though Burns received no formal training and his testimony regarding his LETN training and ride-a-longs was questionable. The sheriff testified that the County did not train officers itself and there were no funds to train personnel. The practice had been to hire individuals for full-time positions who had already received State mandated training. The county also failed to provide formal supervision for its reserve officers. Moore, the full-time officer driving the cruiser in which Burns was a passenger, acknowledged he had no explicit instructions about his responsibilities to supervise a reserve deputy. The county's own expert testified that such supervision of an inexperienced, untrained officer is required and that a reasonable police chief would have provided these guidelines to its regular and reserve deputies.

The jury awarded Jill Brown extensive damages on her claim, finding that Bryan County could be held liable for the single decision not to train Burns before placing him on the street to make arrests. The sheriff's "awareness of Burns' youth, inexperience, personal background, and on-going arrest activities while with the Department, along with the highly predictable risk of injury from the improper use of force by an untrained officer, provided sufficient notice to the sheriff of the need to train Burns so as to make his failure to require training a conscious decision."

Although there were restrictions on Burns, prohibiting him from carrying a gun or driving a car, they allowed him to make arrests thereby knowing that Burns would be engaging in conduct with the potential for harm that required training.

Brown v. Gray, 227 F.3d 1278 (10th Cir. 2000)

Gray, an off-duty officer, shot plaintiff during a road rage incident. The case against Gray was settled after which Brown proceeded to trial against Denver on the supervisory claims. The jury returned a verdict in favor of Brown against the municipality ($400,000.00) in spite of finding that Gray was not acting within the scope of his employment.

Specifically, the plaintiff claimed that Denver failed to train its officers with respect to implementing policies requiring them to be armed and to take proper police action when off duty.

The City argued that the shooting was a result of a personal matter "road rage" rather than misguided police action. The court did not agree, finding that the jury was presented with sufficient evidence to conclude that the defendant was acting as a police officer. He shot Mr. Brown with his service revolver which he was required to carry at all times and identified himself as a police officer prior to the shooting. The jury found that the shooting was directly related to Officer Gray's position as a police officer and the department's failure to train him in the policies.

Lewis v. City of St. Peterburg, 260 F.3d 1260 (11th Cir. 2001)

Plaintiff claimed that police officers fatally shot through the windshield of his vehicle while stopped at an intersection. There was also a claim that the City failed to properly train its officers in how to handle a crisis situation and failed to train its officers regarding the proper use of force in a crisis management situation. Under Florida law, an employer is liable for reasonably foreseeable damages resulting from negligent training. Because the plaintiff did not challenge the implementation or operation of the training program, but rather a decision regarding how to train its officers and what subject matter to include, the claim applied to a discretionary act for which governmental immunity applied.

Ford v. Moore, 237 F.3d 156 (2nd Cir. 2001)

At about l:00 a.m. four officers were dealing with a 20-year-old suicidal man who was sitting in a baseball field dugout holding a rifle pointed at his chin. While engaging Ford in conversation, one of the officers determined that he was about to shoot himself and gestured to another officer with his fingers a signal to disarm Ford. Together they grabbed the rifle, pointed it away from everybody, during which time it discharged prior to the officers seizing it. The struggle continued and one of the officers said he saw a glimpse of silver. A second shot rang out and Ford was bleeding profusely from a wound to the head. The struggling officer looked down and saw that his sidearm was missing from its

holster leaving the officers to believe that Ford took the gun and shot himself. Lt. Moore who was at the police station during the entire altercation determined that the struggling officers who had to be taken to the hospital and were upset would not have to write individual reports but that a combined report would be written by him. The lawsuit claimed excessive force, cover-up of the misconduct and failure to train. Summary judgment was denied as to the four officers at the scene and the two supervising lieutenants. The appeal addressed only the claims against the supervisors.

Plaintiff argued that Lt. Moore failed to adequately supervise by radio his subordinates at the scene of the shooting and that he participated in the cover-up conspiracy. The Court found insufficient evidence supporting the claim of inadequate supervision and stated that in fact, a strong argument could be made that it would have been objectively unreasonable for Moore to have issued directives from afar in a delicate, life and death situation, basing his orders solely on the incomplete information conveyed in scattered radio transmissions. As for the cover up, the court found that there is no clearly established constitutional law requiring the supervisor to make sure that police officers write individual reports of an incident that the supervisor reasonably believes does not involve a criminal investigation. It also noted that Ford's death would have extinguished the constitutional claim of a cover up, "the civil rights of a person cannot be violated once that person has died."

The court noted that on remand the remaining defendants should be permitted to renew their motion for summary judgment on qualified immunity grounds. Without specifically saying so, perhaps the court noted the heroic efforts of the officers in risking their lives to disarm the deceased. They did note "it is not hard to imagine the claim Ford's mother would be making if the officers on the scene had delayed in removing the rifle from her son's grasp and he had succeeded with his initial plan to kill himself with the rifle."

Veneklase v. City of Fargo, 248 F.3d 738 (8th Cir. 2001)

Abortion demonstrators claim they were falsely arrested under an unconstitutional picketing statute. The judgment in their favor was overturned based on the Supreme Court's decision in *Hill v. Colorado,* 530 U.S.703 (2000). The ordinance stated, "no person may engage in picketing the dwelling of any individual in the City of Fargo."

The demonstrators were arrested after refusing to leave the sidewalk in front of the abortion clinic's administrator's home. Their conduct consisted of walking back and forth in single file. They remained silent and carried no signs.

In *Hill,* a Colorado statute made it "unlawful in regulated areas of a healthcare facility to knowingly approach within eight feet of another person for the purpose of passing a leaflet or handbill, displaying a sign, or engaging in oral protest, education, or counseling with such other person…." *Hill*, 120 SCt at 2484. The Supreme Court held that government regulation of expressive activity is content neutral if it is justified without reference to the content of the regulated speech. The ordinances in *Hill* and *Veneklase* passed the well-settled time, place and manner tests. First, neither regulated speech; second, neither was adopted because of a disagreement with the message; and third, both served the State's interests in protecting access and privacy, and providing the police with clear guidelines unrelated to and without reference to the content of regulated speech. In addition, the content – neutral ordinances were tailored to serve significant government interests and preserve ample alternative channels of communication.

Latuszkin v. City of Chicago, 250 F.3d 502 (7th Cir. 2001)

Mrs. Latuszkin was killed by an intoxicated off-duty police officer following a party of officers. The officer was driving his private vehicle when he attempted to pass a vehicle on the right driving up on the sidewalk. Plaintiff alleged that the police department rules prohibited such conduct but that supervisory officers consciously chose to disregard this behavior. Plaintiff's claim was dismissed because he failed to allege a policy or custom of the city. The only claims that were made were made against the police department and its supervisory officials who were not policy makers. Plaintiff's claim that Wilson violated the deceased's due process rights when he struck her with his car also failed because, generally, governmental bodies have no constitutional duty to protect individuals from actions of private citizens. There was no evidence that the officer was acting under color of law when he drove his own car while intoxicated, outside the City of Chicago and was not engaged in any police activity nor did he display any police power or possess any indicia of his office.

Cripe v. City of San Jose, 261 F.3d 877 (9th Cir. 2001)

San Jose Police Department employs approximately one thousand police officers and three hundred supervisory officers. The court described the breakdown of the department into three types of assignments: 1) Beat-Patrol assignments; 2) Modified Duty Assignments (positions set aside for disabled officers); and 3) Specialized Assignments. They evaluated two policies. Under the "Officer Transfer Policy", officers must work as a beat patrol officer in the year immediately prior to receiving a special assignment, which they can generally hold for three years, at which point they must return to patrol duties.

Under the Promotional Policy, all new sergeants must spend 18 months in the Bureau of Field Operations responsible for beat patrols. The Court determined that these policies would be in violation of ADA if they were proven to restrict jobs that disabled police officers could perform to a small class of undesirable assignments and prevented them from advancing to the rank of sergeant. The court reversed the summary judgment in favor of the City, finding that plaintiffs were qualified individuals and were not categorically unable to perform the essential functions of the "special assignments" even though they may be unable to make forcible arrests or subdue suspects. There was no evidence to support the "business necessity defense" and there were sufficient facts presented by plaintiffs sufficient to prove that the City's policies unlawfully denied them the opportunity to advance to the rank of sergeant.

Veile v. Martinson, 258 F.3d 1180 (10th Cir. 2001)

The County Coroner had a policy requiring a rotation of referrals to funeral homes. Plaintiff claimed constitutionally protected property interest in the rotation policy. "The existence of a property right in such a case turns on whether the alleged claim of entitlement is supported or created by state law such as a state statute or regulatory scheme or decisional law." Following, the second, third, fourth, fifth, seven, tenth and eleventh circuits the court concluded that the rotation policy did not give rise to a constitutionally protected property interest because any expectations arising from the rotation policy was not grounded in Wyoming law.

Investigative Detention

McNair v. Coffey, 234 F.3d 352 (7th Cir. 2000)

Coffey wanted to stop the plaintiff's vehicle driving in a high crime area to search it for narcotics. A check revealed that the license plate had been suspended for non-payment of parking fines. The McNairs were reluctant to stop on the poorly lit street and instead drove slowly for about a mile pulling into a gas station where they stopped. Coffey conducted a high-risk stop procedure and when other officers arrived the McNairs were handcuffed and arrested. The appellate court affirmed the jury's verdict that Officer Coffey used excessive force by treating these individuals as if they were armed bank robbers. The court also discussed the split in the circuits on whether or not an officer who has been found to have used excessive force can still be entitled to qualified immunity. Still some good language was found in the decision. "Public officials must act in the shadow of legal uncertainty…police officers must protect the public (and

themselves) as best they can while coping with complex bodies of law that not only change but also often leave important subjects unresolved for extended periods. When the law is in flux, or when the only applicable norm is a multi-factor balancing test incapable of predictable application, prospective relief is used in lieu of damages."

Parks v. Shiflett, 250 F.3d 843 (4th Cir. 2001)

Mr. and Mrs. Parks walked to a Mobil Mart to purchase canning goods at approximately 11 p.m. Upon opening the door they found no one inside. When the alarm went off they placed a call to 911 and stated they would wait for the officers. They did so and explained to the officers what had occurred. While waiting for the officers to conduct their investigation, they realized they had left their stove on and asked for permission for one of them to go home. When this was denied, Mrs. Parks called the fire department to go turn her stove off while Mr. Parks began to leave. Upon seeing an officer grab Mr. Parks, throw him against the wall, kick his legs apart and handcuff him, Mrs. Parks ran toward him and was stopped by an officer who grabbed her, pepper-sprayed her twice and handcuffed her. After throwing a bucket of water over her head she was transported to jail. No charges were filed against the Parks. After a bench trial a magistrate awarded damages of $450,000 to Mrs. Parks and $50,000 to Mr. Parks.

The appellate court affirmed the finding of liability, stating that the officers' actions had transformed an investigative stop into a custodial situation and there was no probable cause to arrest the Parks. The court did reduce the damages because plaintiff did not request punitive damages and there was no proof of losses to justify the compensatory damages to Mr. Parks. Compensatory damages as to Mrs. Parks were reduced to $300,000. "Nothing can so militate against the effective administration of justice and the proper regard for the law of the land as unlawful and reckless conduct on the part of officers who are charged with its enforcement."

Brown v. Dietz, 2001 WL649449 (10th Cir. (Kan))

Under Kansas court rules only news media and educational television may record public proceedings in municipal courts. After testifying, an officer observed plaintiff with a hand-held electronic tape recorder in his shirt pocket. Plaintiff was followed outside, patted down and the tape recorder was taken from him. The court found the *Terry* pat-down to be unlawful since the purpose of *Terry* is "protective in nature and limited to weapons." A *Terry* search may not be conducted to prevent the disappearance or destruction of evidence of a crime. Since the officer did not actually see the plaintiff handling the tape recorder in a

manner that would indicate that he was taping the proceedings, there was no probable cause to justify the search. The search may have been lawful if the plaintiff had consented, there was probable cause to arrest, or probable cause to search plus exigent circumstances.

Excessive Force

Deorle v. Rutherford, 242 F.3d 1119 (9th Cir. 2001)

Mrs. Deorle dialed 911 when her husband lost control of himself and began banging on the walls and screaming. She removed herself and her children from the home. Approximately thirteen officers responded securing the area while awaiting the arrival of the Special Incident Response Team. Officer Rutherford. who had been at the scene for thirty to forty minutes, set up a position where he observed Deorle for about five to ten minutes. He observed Deorle carrying an unloaded, plastic crossbow in one hand and a bottle of charcoal lighter fluid in the other. Rutherford, who was armed with a 12 gauge shotgun, loaded with less lethal beanbag rounds, decided to shoot Deorle when he passed a small tree approximately thirty feet away. Prior to the time of the shooting, Deorle had followed the officers' instructions and dropped a number of objects when being ordered to do so.

When Rutherford shouted at him to drop the crossbow, he discarded it. Without warning Deorle to stop or warning him that he was going to be shot, Rutherford aimed at his torso, striking him in the face resulting in multiple fractures to his cranium, loss of his left eye, and embedded lead shot in his skull.

The court determined that although Rutherford admitted that the rounds could have lethal capabilities at thirty feet and are potentially lethal up to fifty feet, the cloth-case shot appeared to fall short of deadly force as defined by statute to be "that force which is reasonably likely to cause death."

The court ultimately determined that Rutherford's use of force was unreasonable and that he would not be entitled to qualified immunity. This is not a situation that will provide for the type of latitude allowed by Graham as Rutherford was not a lone officer suddenly confronted by a dangerous armed felon threatening immediate violence. He also did not attempt to evade arrest, stayed on his own property and did not pose an immediate safety threat, as he had responded to the officer's instructions and did not attack anyone.

Also, Deorle might never have passed the predetermined spot had Rutherford given him warning or commanded him to halt. At the time of the shooting, Rutherford was confronted by an emotionally disturbed individual who was possibly intent on committing suicide. He was unarmed and walking towards Rutherford at a normal gait. No officer could reasonably have believed that under these facts, this shooting, which was reasonably likely to cause serious physical injury, could constitute reasonable force.

Headwaters Forest Defense v. County of Humboldt, 211 F.3d 1121 (9th Cir. 2000)

This case explores the use of pepper spray to remove non-violent demonstrators. The court determined that:

> (1) the nature and quality of the intrusion is great since protestors suffered excruciating pain when OC was applied to their eyelids with a Q-tip and even more so when it was sprayed into their faces;
>
> (2) other pain compliance techniques may be preferable since the pain applied can be immediately stopped whereas with pepper spray the individual suffers immediate and searing pain that continues until the spray is flushed out thoroughly with water.

The district court erred in determining that the government's interest at stake involved a need to quickly remove the trespassers and in preventing organized lawlessness by a large group of protestors. In this case the use of pepper spray actually took more time than alternatives, and very few of the protestors were in a position requiring immediate removal.

> 1) There was no risk to the safety of officers or others and no need to make a split second decision and the crime was not severe;
>
> 2) given the time to determine how to remove the protestors, the availability of alternative actions was relevant to the reasonableness of the officers' use of force; and
>
> 3) arguments and statements made by officers in an attempt to justify the need to use pepper spray were contrary to fact.

Wagner v. Bay City, Texas, 227 F.3d 316 (5th Cir. 2000)

An officer struggled with Gutierrez who was dragged outside, pepper-sprayed, placed face down on the pavement and the officer placed his shin across

Gutierrez's back. On the way to the station he groaned and was dragged into the station (unknown if he was conscious) and placed face down when one officer noticed he wasn't breathing. The arresting officer performed CPR reviving him but he slipped into a coma at the hospital and died.

In evaluating liability the court compared two similar cases. In Gutierrez v. City of San Antonio, 139 F.3d 441 (5th Cir. 1998) an irrational man with abrasions to his chest and bleeding from the mouth told the officers he "shot some bad coke." He was hog tied, placed in the back scat of the cruiser face down, not monitored and arrived at the hospital dead. The court denied the officers' motion for summary judgment stating that it was impossible to determine whether the officers' actions were objectively reasonable based on the widely distributed San Diego Police Department's report on Sudden Custody Death Syndrome (SCDS). That report concluded that SCDS could be caused by a combination of (1) drug use, (2) positional asphyxia, (3) cocaine psychosis, and (4) hog-tying or carotid choke holds."

In Phillips v. Milwaukee, 123 F.3d 586 (7th Cir. 1997) officers restrained an emotionally disturbed obese man. The court held the officers' conduct to be objectively reasonable because merely restraining a person in a prone position with constant monitoring could not be characterized as deadly force.

In the present case, Gutierrez was not hog-tied and there was no evidence that he was a drug user. There were no apparent physical signs that he was substantially at risk. The court found that the officers' actions were objectively reasonable in the context of the dangerous situation that Gutierrez created.

Miller v. Layton City, 232 F.3d 902 (10th Cir.2000)

Police were dispatched to a car dealership on an altercation involving unknown weapons. Turner, Miller's son-in-law was involved. After the altercation Turner and Miller entered the dealership. The 4th officer to arrive grabbed Miller's hands to frisk him. Miller who was 60 years old and had severe arthritis yelled, "let go." The officer pulled back on his hands causing Miller to fall to the ground resulting in a dislocated shoulder and broken clavicle.

Because police officers may lawfully use appropriate force to fulfill their duties this right is violated only when the force used is objectively unreasonable. The court found the officer's use of force not to be objectively reasonable. He was the 4th officer on the scene of an altercation that had ended. Miller was obviously an elderly gentleman with disfigured hands and he complied with the officer's demands until the point where he was in unacceptable pain.

Griggs v. Transit Authority, 232 F.3d 917 (DC Cir. 2000)

A police canine attacked plaintiff, a burglar suspect, during a search. Plaintiff claimed that the officer failed to properly train "his vicious" dog, failed to control the dog, and commanded the dog to attack plaintiff after he complied with the officer's order to stand and place his hands on his head. The appellate court affirmed the district court order denying officer's motion to dismiss the complaint on absolute immunity and statute of limitations grounds. Plaintiff claims he heard the officer explaining to another officer who arrived at the scene that, "the dog had not worked out in awhile" and "he needed it." Also, at the time plaintiff's injuries were being photographed the officer commented that his dog "got a good workout."

Kastrzewa v. City of Troy, 247 F.3d 633 (6th Cir. 2001)

Plaintiff was arrested for operating a motor vehicle under suspension and a civil warrant for failure to pay child support. Because of his large wrists, officers had trouble handcuffing him and could only latch the cuffs on the first tooth. Plaintiff complained that the cuffs were too tight and that on the way to the station the officers drove recklessly, tossing him about in the back seat. When he arrived at the station and asked the sergeant for medical assistance he was threatened with prosecution for hindering and obstructing if he didn't stop complaining. After finding a larger set of cuffs they transported him to the hospital where a doctor recommended application of ice to reduce the swelling and pain medication. Plaintiff was cuffed again and transported back to the police station.

Ruling on defendant's motion to dismiss the court found sufficient evidence to support an excessive force claim under a *Graham* analysis. He was stopped for making an illegal left-hand turn, arrested for non-dangerous offenses, which were not particularly severe, and there was no evidence that he attempted to flee or resist in any way. The actions of the officers in applying too tight handcuffs, tossing him about in the car and re-handcuffing his swollen wrists to and from the hospital could be found by a jury to be unreasonable. In applying a pre-*Katz* one-step qualified immunity analysis the court denied qualified immunity in a very concise and understandable question. "If the plaintiff's version is credited, what I did, judged today, *arguendo*, would be wrongful; but at the time that I acted, no reasonable officer would have known he was acting wrongfully." The court found that a handcuff policy requiring officers to handcuff ALL detainees during transport would be at odds with the Supreme Court holding in *Graham* requiring

facts of each particular case to be examined in determining the reasonableness of force. (*Soares v. Connecticut,* 8 F.3d 917 (2nd Cir. 1993)).

Neague v. Synkar, 258 F.3d 504 (6th Cir. 2001)

Police handcuffed a disruptive seventh grader at the request of the principal in the principal's office. The handcuffing lasted thirty-three minutes, and when a request was made to loosen the handcuffs the officers did so and there was no resulting injury. The court held that when there is no allegation of physical injury, the handcuffing of an individual incident to a lawful arrest is insufficient as a matter of law to state a claim of excessive force under the Fourth Amendment.

Salazar v. Encinias, 242 F.3d 390 (10th Cir. (N.M))

The court refused to allow plaintiff to submit evidence with regard to his subdural hemotoma when he did not present evidence that the officer's actions were the proximate cause of the injury. There was evidence that the injury could have occurred in a prior altercation.

Deadly Force

Anderson v. Russell, 247 F.3d 125 (4th Cir. 2001)

An officer working a part-time security position at a mall was informed that plaintiff appeared to have a gun under his sweater. Observing plaintiff for approximately twenty minutes, he noticed a bulge and followed him out into a parking area where plaintiff was ordered to his knees and to put his hands up. He complied, but when he reached into his left back pocket to turn off his walkman, the officer believed he was reaching for a weapon and shot him three times. A jury returned a verdict for the defendant.

On appeal the court ruled that as a matter of law Russell's use of force did not amount to a constitutional violation and therefore the Section 1983 Excessive Force claim should not have been submitted to the jury. There was no evidence to refute Russell's testimony of the citizen's report of the gun or his perception of the bulge. Once Russell perceived the bulge consistent with the shape of gun, he was justified in believing that Anderson was armed and dangerous.

Plaintiff argued that there was a triable issue of fact regarding the precise position of Anderson's hand and the speed at which he was lowering his hands. The court found these discrepancies did not raise an issue of triable fact. Plaintiff also claimed an issue existed with regard to Russell's failure to utilize available

cover behind protective pillars rather than firing at Anderson. "The suggestion that the officers might have responded differently is exactly the type of judicial second look that the case law prohibits."

Finally, Anderson argued that Russell's decision to shoot was unreasonable given the minor nature of the suspected criminal activity. (Violation of the concealed weapon law is a misdemeanor.) The court responded, "at the precise moment that Russell used deadly force, he reasonably believed that Anderson posed a deadly threat to himself and others, making the nature of the suspected criminal activity at issue at the time Russell approached Anderson irrelevant."

Addressing the mistaken nature of the events the court quoted previous precedent, "the Fourth Amendment does not require omniscience…. officers need not be absolutely sure…. of the nature of the threat or the suspect's intent to cause them harm – the Constitution does not require that certitude precede the act of self-protection."

Milstead v. Kibler, 243 F.3d 157 (4th Cir. 2001)

A 911 operator reported that Milstead had been shot in the neck and his fiancée had been stabbed by her former boyfriend. Upon arrival, officers saw fresh blood on a van and on the steps leading to the house. They heard calls for help and, upon entry, saw two figures wrestling on the floor. One of the men withdrew and warned the officers that the other had a gun. The remaining man pointed a gun at Officer Proctor who backed up while firing four shots. When Proctor fell backwards onto the deck outside the door, Officer Kibler believed he had been shot and retreated out of the house. He heard a man yell that he was going to "kill all of you" and about 15 seconds after retreating, Kibler saw someone crash through the door and run. When the man turned toward him he fired two shots. The person's hands were about chin level and he did not see anything in them in the dim light. The officer had shot Milstead who was still alive and told him "he's still inside." He found Officer Proctor and told him he had shot the good guy. Several minutes later, when backup arrived, they found that the assailant had killed himself and Milstead's fiancée was also dead. Milstead died shortly after arriving at the hospital.

The court affirmed summary judgment for the officers based on qualified immunity, applying *Garner* which held that deadly force is justified where it is necessary to prevent the escape and the officer has probable cause to believe that the suspect poses a significant threat of death or serious physical injury to the officer or others. Applying *Graham*, the court noted that the objective facts "must be filtered through the lens of the officer's perceptions at the time of the incident

in question…this limits second-guessing the reasonableness of actions with the benefit of 20/20 hindsight and limits the need for decision-makers to sort through conflicting versions of the actual facts, and allows them to focus instead on what the police officer reasonably perceived."

The court described the two circumstances in which an officer may mistakenly but reasonably use deadly force. The first is when officers intend to shoot at an individual and actually hit the wrong person. The second, as in this case, is when they intentionally shoot at the wrong person. In the latter, the Fourth Amendment applies.

Reviewing the facts from Kibler's perspective, he had reason to believe that 1) a woman had been stabbed, 2) Milstead had been shot in the neck and 3) the intruder was armed with a gun, and had apparently shot at Officer Proctor and had threatened to kill all the officers. Believing that Milstead had been shot in the neck, it was not unreasonable for him to believe that it was the intruder who had run through the door. Because of the poor lighting he could not be sure whether he was holding a gun, and in the second or two after the person crashed through the door, he had to decide whether to fire. In this instance of mortal danger his mistake was tragic but not unreasonable.

Willingham v. Loughnan, 261 F.3d 1178 (11th Cir. 2001)

Plaintiff, standing in her doorway, observed a police dog biting her brother's leg during an altercation with police. She threw a knife, bottle and glass at the officers before being shot. She was wounded when two officers each fired four shots at her. She was convicted of attempted murder and battery. The court concluded that *Heck* did not prevent her from suing because the conviction did not determine whether the officers' acts were reasonable and would not call into question the validity of plaintiff's criminal conviction.

The court affirmed the district court's granting of the City's motion for judgment as a matter of law rejecting the jury's verdict of $5 million in compensatory damages and reversed the trial court's denial of defendant officers' motion for judgment as to the $500,000 in punitive damages awarded against each officer. The court found that the officers were entitled to qualified immunity. The question for the purpose of qualified immunity was "whether defendant officers violated clearly established federal law in 1987, by shooting plaintiff within a "split second" after she attacked two officers – having just tried to kill one of them – while she, at the moment, was not in the physical control and was standing unarmed but near the area from which she had already obtained four objects she had used as weapons, at least one of which was a potentially

lethal weapon." Even if plaintiff was unarmed and the officers' use of force was unreasonable, the court could find no controlling and materially similar cases to establish that the officers' acts, under the circumstances, were clearly illegal at the time of the incident.

Dudley v. Eden, 260 F.3d 722 (6th Cir. 2001)

Three officers surrounded the car of a bank robbery suspect who sped away when one of the officers attempted to reach into the car. The officers shot at the plaintiff's tires. At this point Officer Eden was arriving at the scene, heard the shots and pursued Dudley. Dudley claimed that he did not pose a risk of a threat justifying deadly use of force. After robbing the bank he waited for the police in the hope that they would help him commit suicide. He admits that he drove away from the police but at a slow rate of speed and he collided with Officer Eden's vehicle because the officer cut him off. He was unarmed and did not pose a danger to others as the threat was eradicated when Eden's vehicle collided with his, slowing it down to the point where it was nearly stopped.

From Eden's point of view he had reason to believe that Dudley had just committed a bank robbery and, even if the dispatcher reported that no guns were displayed, it was reasonable for him to believe that Dudley was armed. When he arrived at the scene of the stop he saw Dudley accelerate out of the parking lot and shots were fired. He did not know by whom or for what reason.

The court found that, given Dudley's bank robbery, his refusal to comply with the commands of armed officers, his attempt to evade arrest, and his reckless driving, it was reasonable for the officers to conclude that Dudley posed a serious threat to himself and others. Given the position of the vehicles he could have re-initiated his escape and the officer would have been in a position of danger if Dudley had been armed. "Given Officer Eden's precarious position and the uncertainty of this rapidly evolving situation, no jury could find that Officer Eden's fear and his use of force were unreasonable."

Medina v. Cram, 252 F.3d 1124 (10th Cir. 2001)

When a bail bondsman went to Mr. Medina's house to take him into custody, Mr. Medina claimed he had a gun, causing the bail bondsman to call the police. Medina refused to leave the house and began using cocaine and drinking rum. Officers spoke to him by phone, and he said he needed time, had a gun and expressed suicidal thoughts. When he emerged from his house, he had his right hand wrapped in a towel concealing a staple gun which officers believed was a firearm. He was first shot with non-lethal beanbag rounds and then attacked by a

dog. When these efforts failed, an officer followed him as he walked down the street hoping to knock him to the ground. The attack dog was released a second time causing Medina to fall to the ground exposing what the officers believed was a gun. Two officers within a distance of eight to twelve feet fired five shots injuring Medina.

The appellate court overturned the district court's denial of summary judgment, finding the officers' use of force to be objectively reasonable. They rejected contentions that the officers acted unreasonably in creating the need to use force. In order to create liability based on prior acts, an officer's conduct before the suspect threatens force is relevant, provided it is immediately connected to the seizure and a threat of force. Also, the conduct creating the need for force must rise to a level of recklessness rather than negligence.

The key issue here was the officers exposing themselves to danger rather than taking cover. The court found that even if they determined that the officers' failure to take cover contributed in a need to use force, such actions would not arise to the level of reckless or deliberate conduct. Finally, the expert's affidavit that the officers' use of force did not conform with accepted police guidelines and practices was not sufficient since claims based on violations of state law and police procedures are not actionable under Section 1983. To consider the expert's assertion regarding the failure to use pepper spray and other tactical measures, would require the court to evaluate the officers' conduct from a 20/20 perspective of hindsight rather than the perspective of an officer making a split-second judgment on the scene.

Thompson v. Hubbard, 257 F.3d 896 (8th Cir. 2001)

An officer responded to report of shots fired and two suspects fleeing on foot from the scene of an armed robbery. He approached Thompson, who fit the description and was getting into his car. When Thompson began to flee, Officer Hubbard attempted to grab him. He only succeeded in pulling off his jacket. He chased Thompson between two buildings and observed him climbing over a short fence. When Thompson got up off the ground his back was to Hubbard. He looked over his shoulder, moved his arms as if reaching for a weapon at waist level. Hubbard yelled, "stop" and when Thompson's arms continued to move, he fired a single shot killing Thompson. No weapon was found and there were no other witnesses to the incident.

Plaintiffs claimed the officer should not be entitled to summary judgment, challenging his credibility and arguing that the officer should have known that Thompson's sweat pants would not have been strong enough to hold a gun. To

defeat the motion for summary judgment, the plaintiffs needed to present enough evidence to permit a reasonable jury to conclude that Hubbard's use of deadly force was objectively unreasonable. "Plaintiff's may not stave off summary judgment armed with only the hope that the jury might disbelieve witnesses' testimony." "…An officer is not Constitutionally required to wait until he sets eyes upon the weapon before employing deadly force to protect himself against a fleeing suspect who turns and moves as though to draw a gun."

Monroe v. City of Phoenix, 248 F.3d 851 (9th Cir. 2001)

Sergeant Sherrard claimed he was involved in a violent struggle with Monroe prior to shooting him in the chest. Although Sherrard did not know that the plaintiff had just burglarized a business, he did hear a burglar alarm going off when he approached the plaintiff. Sherrard claims that after taking a hunting knife away from the plaintiff, he believed he had other weapons because during a pat-down, he felt what he believed might be a small automatic pistol. Plaintiff actually had two small knives and burglary tools. Plaintiff struck Sherrard in the head and ran away. During a long struggle they ended up wrestling on the hood of the patrol car with the plaintiff lifting Sherrard off the ground and pushing him against the car. When he felt a tug on his gun belt and could not see the plaintiff's hands, Sherrard drew his gun, ordering plaintiff to stop or he would shoot him. When the struggle continued, Sherrard shot the plaintiff at close range in the abdomen. The jury returned a defendant's verdict. Plaintiff appealed, challenging the jury selection and jury charge.

Jury Selection

Plaintiff claimed the court erred in not questioning the jurors about specific well-known police misconduct litigation. Instead, the court questioned the jury about general allegations of police misconduct and their views concerning all parties involved in such cases. The appellate court found that the district court had no obligation to ask the jurors about specific cases and indeed to do so may very well have been prejudicial and inflammatory.

Jury Instruction

The court gave a general instruction on use of force and state law regarding deadly use of force. The court found that it was an abuse of discretion not to give a Garner deadly force instruction. "Where the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officers or to others…. Thus, if the suspect threatens the officer with a

weapon…deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given.

This error was harmless because the evidence would have supported a verdict for the defendant even with the requested instruction. Construing the evidence in a light most favorable to defendants, a reasonable juror could conclude that Sherrard had probable cause to believe that Monroe posed a threat of serious physical harm to him. Sherrard knew Monroe had two knives in his pocket, was engaged in a physical struggle, was unable to see Monroe's hands and felt a tug on his gun belt. When he took his gun out of his holster he could not regain control of Monroe who had had his arms around him and, the Sergeant was off balance when Monroe refused to comply with his orders prior to the shooting.

Sergeant Sherrard made a split-second judgment. "Surely he was not required to wait and be seriously injured or killed before exercising his judgment in bringing the situation under control. A reasonable jury could conclude that Sergeant Sherrard had probable cause to believe that Monroe posed a threat of serious physical harm even though he did not actually have a weapon in his hand when Sergeant Sherrard shot him. The suspect needs not be armed or pose an immediate threat to the officers or others at the time of the shooting. *Forrett v. Richardson*, 112 F.3d 416 (9th Cir. 1997).

Fisher v. City of Memphis, 234 F.3d 312 (6th Cir. 2000)

An officer was found liable when he wounded a passenger in a vehicle that he shot at when the vehicle drove toward him forcing him to jump on to the hood of his police car. The court ruled that statues dealing with the duty of police officers to arrest individuals suspected of breaking the law was not relevant since the issue in this case was self-defense. The court also applied the Fourth Amendment test even though the plaintiff was not the intended target of the officer's use of force. By shooting at the driver of the moving car, he intended to stop the car effectively seizing everyone inside, including the plaintiff, thus, because the defendant "seized" the plaintiff by shooting at the car, the district court did not err in analyzing the defendant's actions under the Fourth Amendment.

Bazan v. Vargas, 246 F.3d 481 (5th Cir. 2001)

The appellate court upheld the district court ruling finding disputed issues of fact precluding an officer's summary judgment motion even though the officer was the only witness at the time of the deadly use of force. The officer claimed that the deceased, who had grabbed his flashlight, was attempting to hit him over the head while the trooper was attempting to apply a carotid hold. The trooper

also said that the deceased was biting his left finger that he thought he might lose. The lack of forensic evidence and disputed facts related by witnesses prior to the deadly use of force created genuine issues of disputed fact. The deceased's brother and friend's testimony regarding the altercation that occurred prior to the deceased running into the woods, contradicted the officer's testimony, and there was no physical evidence indicating an injury to the officer's head or finger. The expert opinion rendered by the commander of the training academy was of no help, since it relied solely on the trooper's testimony.

Search & Seizure

Kee v. City of Rowlett, Texas, 247 F.3d 206 (5th Cir. 2001)

Investigators placed an electronic surveillance wiretap into a funeral urn close to the graves of two children who had been murdered. This was done without a warrant, court order or family consent. Permission was received from the owners of the cemetery to enter and conduct surveillance. Officers also videotaped activities at the gravesite, which was attended by news reporters from local television stations.

The dispositive issue is whether the secret electronic recording of private prayers and conversations directed at the deceased's relatives violated a reasonable expectation of privacy. The court found that the key factors were whether plaintiffs exhibited a subjective expectation of privacy, that their communications would remain free from governmental intrusion and whether they took normal precautions to maintain privacy. In the context of public conversations, courts have considered 1) the volume of the communication, 2) proximity or potential of other individuals who may overhear the conversation, 3) potential for communications to be reported, 4) affirmative actions taken by the speakers to shield their privacy, 5) the need for technological enhancement to hear the communications, and 6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.

In this case plaintiffs failed to prove that their communications were free from being heard by eavesdroppers who may have been in close proximity and failed to present evidence demonstrating any affirmative steps taken to preserve their privacy. While they did not expect government agents to surreptitiously record their prayers, they were aware that the service was being conducted in an outdoor setting.

Kerman v. City of New York, 261 F.3d 229 (2nd Cir. 2001)

Police received an anonymous phone call (plaintiff's girlfriend placed the call) stating that a man at a certain address and telephone number was mentally ill, acting crazy, off his medication, and possibly had a gun. Arriving officers rang the doorbell, pounded on the door and waited several minutes until Kerman, who had been in the shower, opened the door. According to the plaintiff, the officers slammed the partially opened door into his forehead, knocking him to the floor. They then rushed in, jumped on his back, pulled his arms behind him and handcuffed him. One officer allegedly put a gun to his head and said, "Listen you fucking nut job, just hold still or I'll blow your brains out." They then dragged him on his stomach up a short flight of stairs and pushed him against the wall where he stood naked. The lieutenant in charge held the door open with people looking in from the outside. When plaintiff asked for it to be closed the lieutenant replied, "You shut your fucking mouth, I'll shut the door when I want to." While officers searched his apartment plaintiff made hostile remarks including, "It must be a slow day at Dunkin Donuts" and the officers gave, "Mark Furhman a good name." Plaintiff's girlfriend and doctor called, but police allegedly did not give them an opportunity to explain the circumstances. Plaintiff said he would walk to the ambulance and asked to go to Presbyterian Hospital. Instead, the lieutenant stated to him, "I'm going to teach you a lesson…I'll give you something to sue for." They had him put in a restraint bag, carried out on a stretcher and taken to Bellevue Hospital. An appeal followed a jury verdict in favor of plaintiff in the amount of $75,000.

Warrantless Entry:

Police officers may enter a dwelling without a warrant to render assistance to a person whom they reasonably believe to be in distress. However, the question in this case was whether an uncorroborated and anonymous 911 call was sufficient to establish probable cause that plaintiff was in danger. The courts found that based on the absence of evidence in the record to corroborate the 911 call and the protection afforded to private dwellings under the Fourth Amendment, the officers' warrantless entry into plaintiff's apartment violated the Fourth Amendment. Although the Supreme Court in *Alabama v. White (1990)* and *Florida v. JL (2001)* cast doubt on the reliability and constitutional sufficiency of anonymous tips, in 1995 there was no clearly established law prohibiting a warrantless entry into an apartment on the grounds of exigent circumstances based solely on an anonymous 911 call, therefore providing the officers with qualified immunity.

Seizure:

Plaintiff claims the officer's decision to handcuff and detain him during the search violated his Fourth Amendment rights. An officer's decision to handcuff and detain a person will not violate the Constitution so long as the officer had probable cause to believe the person presented a risk of harm to himself or others. Because police had no other information outside of the anonymous 911 call, which police cannot now rely on, plaintiff alleged a constitutional violation. Nevertheless, the police are entitled to qualified immunity since once inside the apartment reasonable police officers could, at very least, disagree over whether, in light of the mention of a gun, they could protect themselves from a dangerous situation by handcuffing and immobilizing the plaintiff.

Excessive Force:

Given plaintiff's version of the facts that he was handcuffed tightly, verbally abused, humiliated and unnecessarily confined in a restraint bag, there remained a disputed issue of fact as to whether or not the use of force was objectively reasonable.

Hospitalization at Bellevue:

Given the lieutenant's failure to corroborate the 911 call and ignoring two opportunities to confirm the seriousness of the plaintiff's condition with his girlfriend and doctor, a jury could find that the officers acted unreasonably in placing plaintiff in restraints and transporting him to the hospital after failing to reasonably investigate his mental state and grossly misjudging the situation.

Retaliation for Protected Speech:

The court found that plaintiff had a right to criticize the police without reprisal supporting his interests protected by the First Amendment. Proof that the defendant's actions were motivated by or substantially caused by the plaintiff's exercise of his First Amendment rights were supported by the lieutenant's comments that he would give him something to sue for.

Perez-Terrado v. Irizarry, 232 F.3d 270 (1st Cir. 2000)

Several witnesses observed officers hitting and kicking a drug seller in an attempt to force him to spit out drugs he was swallowing. He died from internal bleeding due to a laceration of his spleen. Apparently he had a disease causing an enlarged spleen, making it easy to lacerate. The court agreed with an earlier Second Circuit ruling that "it is a settled principle of tort law that when a defendant's wrongful act causes injury, he is fully liable for the resulting damage

even though the injured plaintiff had a preexisting condition that made the consequences of the wrongful act more severe than they would have been for a normal victim", Maurer v. United States 662 98, (2nd Cir. 1981). Applying this "eggshell skull" doctrine the court upheld the verdict in favor of plaintiff.

Brent v. Ashley, 247 F.3d 1294 (11th Cir. 2001)

Plaintiff and a male Nigerian were the only black persons on a flight from Rome to Houston with a stop at Miami. In Miami, plaintiff observed the Nigerian being searched by a customs officer. Based on her disapproving look, she was detained and escorted to an examination area. Before, during and after the search of her baggage she complained that she was being treated this way because she was black. She was subjected to a full body pat-down and a strip-search. When she went to the bathroom she was accompanied and her urine was checked for signs of contraband. Her name was then entered into the computer system for frequent travels or past arrests. She was then taken to the hospital for an x-ray and pelvic examination. None of these efforts resulted in a discovery of any narcotics.

Because border searches of persons and effects of entrants are not subject to any requirement of reasonable suspicion, the initial stop was determined to be lawful. The strip-search, however, required reasonable suspicion. Supporting reasonable suspicion was the custom official's belief that plaintiff fit the general profile of an arrival from a source country and her nervousness. On the exculpatory side were the futile luggage search, computer check and plaintiff's verifiable residence and employment information. The strip-search was deemed to be unconstitutional. For the same reason, plus the fact that the strip-search revealed no evidence of narcotics, the x-ray examination also amounted to a Fourth Amendment violation.

The Court denied defendant's motion for summary judgment on qualified immunity resolving factual disputes in favor of plaintiff. At trial the defendants will have an opportunity to argue that the stop and search were lawful based on the following facts:

1. plaintiff fit a smuggling profile of African-American woman on the same flight as a Nigerian man;

2. plaintiff arrived from a known source country;

3. she showed disapproval of the treatment of the Nigerian man;

4. her ticket had been purchased by a friend with a credit card from the same travel agency where the Nigerian man's was purchased;

5. she, like the Nigerian man, was going to Houston;

6. she wore expensive clothes; and

7. she was nervous and became agitated when confronted.

Johnson v. City of Evanston, 250 F.3d 560 (7th Cir. 2001)

A car repair clinic performed work on plaintiff's vehicle without authorization. Police sided with the clinic and told plaintiff he could not have his vehicle or property within it and that the police department was taking custody of the car, which they would leave at the clinic. Court denied motion for summary judgment finding that such action would violate plaintiff's rights by seizing his property unreasonably, and by retaining it without due process of law. "The constitution's requirements are as applicable to the police when they chose sides in a dispute among citizens as when they seize evidence for use in criminal prosecutions." *Soldal v. Cook County,* 506 U.S.56 (1991); *Guzell v. Hiller,* 223 F.3d 518 (7th Circuit 2000). Court did find that the plaintiff lacked standing to complain about the police refusal to prosecute the clinic.

Thomas v. Roberts, 261 F.3d 1160 (11th Cir. 2001)

Strip-searching fifth graders to discover evidence of monetary theft without individualized suspicion is unconstitutional. The DARE officer and school officials conducting such searches would be entitled to qualified immunity since the Supreme Court rulings of *T.L.O.* or *Vernonia* would not compel one to conclude that the searches in this case were constitutionality impermissible. Evidence of the officers' training in search and seizure, as well as a lack of a causal relationship between deficiencies in the disciplinary process and the illegal searches precluded a liability finding against the county.

Wilson v. Jones, 2001 WL 543452 (11th Cir. 2001)

Blanket policy of requiring strip searches before arrestees are admitted to jail was determined to be unconstitutional following similar decisions in the 1st, 2nd, 5th, 6th, 7th, 8th, 9th, 10th circuits. The court recognized that reasonable suspicion is sufficient to justify a strip search of a pretrial detainee when it is believed that the person is concealing contraband or a weapon.

Nelson v. Jones, ___ F.3d ___ (11th Cir. 2001)

Blanket policy of requiring strip-searches before arrestees are admitted to jail was determined to be unconstitutional following similar decisions in the 1st, 2nd, 5th, 6th, 7th, 8th, 9th and 10th circuits. The court recognized that reasonable suspicion is sufficient to justify a strip-search of a pretrial detainee when it is believed that the person is concealing contraband or a weapon.

Hector v. Watt, 235 F.3d 154 (3rd Cir. 2000)

Victims of unreasonable searches or seizures may recover damages directly related to the invasion of their privacy, but such victims cannot be compensated for injuries that result from the discovery of incriminating evidence inconsequent criminal prosecution. Plaintiff in this case claimed damages for alleged illegal search resulting in 80 lbs. of hallucinogenic mushrooms.

False Arrest

Case v. Kitsat County Sheriff's Department, 249 F.3d 921 (9th Cir. 2001)

Plaintiff claims that officers falsely arrested her on a felony warrant from the state where she had previously resided and illegally entered the home in which she was now staying. The court found the officers' actions were lawful ruling on the following matters:

- NCIC hits are routinely accepted in establishing probable cause for a valid arrest.
- Even if the officers' actions did not conform to state law or internal department policy, their conduct did not violate plaintiff's constitutional rights.
- Because the officers had reason to believe that plaintiff was wanted on an out-of-state felony, had reason to believe she was in the home and had reason to believe that she was presently there, their forced entry into the home was lawful even absent exigent circumstances.

Young v. City of Little Rock, 249 F.3d 730 (8th Cir. 2001)

Plaintiff was arrested on a warrant for her sister who used her name as an alias. When the officer asked her for verification, the dispatcher misread the information on her computer, failing to notice that plaintiff's name was listed only as an alias. At the station the officer noticed that the attached photograph did not match the plaintiff and asked his supervisor what to do. The supervisor

asked him to seek guidance from the detectives who told him plaintiff would have to remain in jail until Monday morning when a judge could decide what to do. On Monday morning a judge ordered plaintiff's release after a fingerprint check. Because plaintiff was in jail garb she was transported to the jail, while chained to other detainees, strip-searched and released after approximately two and a half hours.

Several defendants settled claims for $47,500, some claims were disposed upon summary judgment and the remaining claims resulted in a jury award of $100,000.00. The court found that the officer and dispatcher's mistakes amounted to nothing more than negligence and therefore did not give rise to a claim under Section 1983. The court held that the decision to hold Ms. Young for a judicial determination was not objectively unreasonable and therefore the officer and sergeant were entitled to qualified immunity.

Finally, the court upheld the jury verdict finding that transporting plaintiff back to jail in chains and strip-searching her when she had been determined to be innocent of any charge, was shocking and therefore the jury award would not be overturned nor would the damages be reduced.

Arpin v. Santa Clara Valley Transportation Agency, 261 F.3d 912 (9th Cir. 2001)

A 60-year-old woman was arrested based on a complaint of a bus driver that she unlawfully touched him. Officers charged her with battery, resisting arrest and they took her to jail where she was strip-searched. Although the arrest could have been found to be unlawful under California statute, which allows officers to only make warrantless arrests for misdemeanors occurring in their presence, it was successfully argued that the bus driver had actually made a citizen's arrest prior to the officers' arrival. Although the strip search was unlawful, the officers could not be held liable because it was conducted by two unnamed female officers. Plaintiff's complaint regarding the false arrest was allowed to proceed on the basis of her allegation that officers relied solely on the bus driver's complaint and failed to undertake an independent investigation.

Provost v. City of Newburgh, 262 F.3d 146 (2nd Cir. 2001)

Provost, the owner and operator of a halfway house, went to the Newburgh police station to pick up one of his residents. After being told he would be attended to, he continued to go to the window every ten or fifteen minutes for an hour. At his final trip to the window officer's claim he said something to the effect of "What do you mean you don't know where he is? I don't have time for this bullshit and I can't sit around on my fat ass all day like you." Lt. Sorrentino

told Officer Roper to go handle the problem. Roper arrested Provost, charging him with disorderly conduct. The jury awarded Provost $1.00 in nominal damages against each defendant and $10,000 in punitive damages against each of them for unlawful arrest.

The court held that Sorrentino was entitled to judgment as a matter of law because there was no evidence that he participated directly in plaintiff's arrest or that he was grossly negligent or deliberately indifferent to Provost's rights. To support a claim of personal involvement by a supervisory defendant the plaintiff must show that the supervisor 1) personally participated in the alleged constitutional violation; 2) was grossly negligent in supervising subordinates who committed the wrongful acts; or 3) exhibited deliberate indifference to the rights of the plaintiff by failing to act on information indicating that unconstitutional acts were occurring. The court felt that Sorrentino did not directly participate because he did not have knowledge of the facts that rendered the conduct illegal. His claim was distinguished from an officer's duty to intervene to protect the constitutional rights of citizens from infringement by other law enforcement officers in their presence, which the court found Provost had not claimed against Sorrentino.

Because it was necessary for Provost to raise his voice to be heard through the bulletproof glass and other reasons, the court found the jury could reasonably find that when Provost raised his voice the noise was not unreasonable. The court further found that his speech was constitutionally protected "only fighting words directed at police officers can be criminalized, and the fighting words doctrine is probably narrower in application in cases involving words addressed to a police officer, because the properly trained officer may reasonably be expected to exercise a higher degree of restraint than the average citizen."

Finally, the court denied the officers' appeal based on qualified immunity because his attorney failed to claim qualified immunity in his motion for judgment as a matter of law. The dissenting opinion noted that this amounted to "manifest injustice." The Lieutenant who ordered his subordinate to handle the problem and stood by while the arrest was being made was not required to pay $10,000 while his officer was being punished for his lawyer's mistake.

Wilson v. Lawrence County, 260 F.3d 946 (8th Cir. 2001)

Plaintiff, who was mentally retarded, spent nine years in prison after being convicted of a murder. The murder conviction was entered after an Alford plea, enabling plaintiff to avoid the death penalty. He was granted a full pardon after an independent investigation concluded that he did not commit the crime. Court

found that the investigating officers were not entitled to qualified immunity on Wilson's claim that they violated his Fifth Amendment right against self-incrimination by coercing an involuntary false confession from him. "Whether a confession is the involuntary product of coercion is judged by the totality of the circumstances – including an examination of both the conduct of the officers and the characteristics of the accused." When officers interrogated Wilson, he was never left alone, no friend, family member, guardian or advisor was present, they lied to him about an eye witness and that a psychiatrist had analyzed him, offered leniency if he confessed, insisted that he would be found guilty if he did not confess, rebuked him for not cooperating when he failed to provide correct details about the crime, offered details of the crime through leading questions, and used threatening tones and language throughout the entire interrogation. The court affirmed the denial of qualified immunity on plaintiff's claim that he was arrested without probable cause when he was picked up and brought to the police station on questioning and the claim that the officers knowingly used false and unreliable evidence against Wilson at his criminal proceedings.

Finally, the Court denied qualified immunity on plaintiff's claim that the detectives failed to investigate other leads. Plaintiff pointed to information concerning an escaped felon with a modus operandi matching the homicide and an eyewitness who saw someone outside the house shortly before the fire as these leads the officer chose not to pursue. "Law enforcement officers, like prosecutors, have a responsibility to criminal defendants to conduct their investigations and prosecutions fairly as illustrated by the Brady line of cases requiring the state to disclose exculpatory evidence to the defense." If Wilson's evidence proves credible at trial, the failure to investigate could lead to a finding that their inaction was reckless or intentional, thus supporting a due process claim.

<u>Sanford v. Motts,</u> 258 F.3d 1117 (9th Cir. 2001)

Plaintiff was allegedly punched in the face by an officer after being arrested when she attempted to interfere in the officer's arrest of her boyfriend and his young brother. She was convicted of resisting arrest. Defendants claim that her conviction precluded an action under *Heck v. Humphrey*). *Heck* holds that a plaintiff cannot maintain a Section 1983 claim if success on the claim would necessarily imply the invalidity of a prior criminal conviction. Defendant's own version of events indicated that the alleged punch may have occurred after the arrest and her conviction may have been based on events unrelated to the time of the alleged assault. Therefore, *Heck* did not apply.

Failure to Protect

Weeks v. Portage County Executive Offices, 235 F.3d 275 (6th Cir. 2000)

Sometime after being struck in the head with a flashlight, Ray Weeks approached Sheriff Longbottom who was engaged in a traffic stop of David Bogden. Bleeding, staggering, incoherent and apparently in shock both independently asked if he needed medical attention. After twice saying he was fine, Longbottom told him to move along. The following morning he was found dead along the side of the road. Autopsy indicated that he had suffered an additional beating but that the death was likely caused by the blow to the top of his head inflicted by a large flashlight. The court found that the officer's actions did not put Weeks in a more vulnerable position than he was in before their encounter because he was not in police custody and there was no other special relationship with the victim. Weeks had no constitutional right to have the police provide medical assistance or intervene to protect him from the actions of private actors. Further, Longbottom's comment to Bogden that Weeks "was a white man in the wrong neighborhood" is not sufficient to raise an inference of racial discrimination absent evidence that Longbottom would have called for an ambulance if he had been Black.

Tlamka v. Serrell, 344 F.3d 628 (8th Cir. 2001)

Failure to approach or provide CPR to a prisoner who was having a heart attack for a period of ten minutes would amount to deliberate indifference in violation of plaintiff's 8th Amendment rights. Plaintiff's allegation of inadequate training failed, as it was uncontroverted that all officers were trained in CPR and that such training was updated as necessary.

Garcia v. City of Boston, 253 F.3d 147 (1st Cir. 2001)

Plaintiff, who was arrested on a Friday night, superficially cut himself on the wrist but refused and didn't need medical attention. He was placed on a suicide list and handcuffed to the suicide wall. Somehow, on Saturday evening, he obtained matches and lit himself on fire. The hospital refused to admit him because he was uninsured. He was taken to the Department of Mental Health Center and was refused admittance because he had not yet been arraigned. He was taken back to the station and handcuffed to the suicide wall but somehow again obtained matches and lit his shirt on fire. He later removed a gun from the officer serving lunch, shot the officer and another inmate before he was shot in the arm. Although the court found that Garcia's psychological problems constituted a serious medical need, they did not find deliberate indifference since the Department had a policy for handling suicidal prisoners and it was the unusual circumstance that led to the inability to admit him to a medical facility.

Yellow Horse v. Pennington County, 225 F.3d 923 (8th Cir. 2000)

Neither the supervisor who took decedent off of suicide watch, nor the officer who allegedly failed to single out plaintiff for more than regular checks could be found to be deliberately indifferent, as they did not know of and disregard an excessive risk to the plaintiff's health or safety. Failure to train claim also failed since all officers are required to complete training courses on suicide prevention, and the jail was accredited by the American Correctional Association, a month before plaintiff's suicide. Suicide prevention training was held and the policy required suicide screenings and suicide watch procedures.

Hott v. Hennepin County, 260 F.3d 901 (8th Cir. 2001)

Suicide cases are generally treated as allegations that officials failed to provide adequate medical treatment. The burden is on the plaintiff to show that he suffered from a serious medical need and that the jail officials actually knew of his need but deliberately failed to meet it. Plaintiff claimed that the officials should have known of Hott's suicide risk because he'd been treated in a county hospital where he was diagnosed as being suicidal, made repeated gestures by holding his hands on his throat and squeezing, made a late night call to his girlfriend, and appeared visibly glum. The court found this evidence to be insufficient to support a claim that the employees had actual knowledge that Hott posed a serious risk of harm to himself and found no constitutional duty to obtain medical records from outside the facility.

The evidence was sufficient to show that the deputy failed to conduct cell checks in accordance with policy. Policies and training materials reflect a concern over the possibility of inmate suicide. Thirty minute checks are required in the special needs section where the plaintiff was housed. Against the backdrop of this serious risk of suicide was evidence that in the prior fifteen years there had only been one other suicide, there were two suicide attempts per year and in the year of plaintiff's suicide almost 45,000 had been booked in the facility. Therefore, even if the deputy failed to conduct checks according to the policy, his actions would not amount to deliberate indifference.

Louden v. City of Minneapolis, Minnesota, 233 F.3d 1109 (8th Cir. 2000)

An officer dealing with a landlord/tenant dispute was told by the landlord that he had to return to his apartment to get his oxygen. She said he would first have to get the storage room key where the tenant's property was. Plaintiff passed out, went to the hospital and later sued the officer for preventing him from obtaining his oxygen. Court found that the officer was entitled to qualified immunity

because it was undisputed that the officer did not know of plaintiff's medical problems or that he risked loss of consciousness or stroke if he did not reach his oxygen.

Munger v. City of Glasgow Police Department, 227 F.3d 1082 (9th Cir. 2000)

About midnight officers ejected Munger from a bar wearing only a T-shirt and jeans. They refused to allow him to drive his truck (because he was intoxicated) or re-enter the bar and saw him walk away in a temperature of 11 degrees and wind chill factor of minus 20-25 degrees. The officers went looking for him but he was not found until the next day – dead of hypothermia. The appellate overturned the district court's grant of summary judgment claiming that it would seem undisputable under these facts that the officers placed Munger in a more dangerous position than the one in which they found him. The court also found genuine issues of material fact with regard to the department's failure to train under theories including: 1) failure to train officers regarding appropriate assistance and treatment of intoxicated persons; 2) appropriate handling of persons who are obviously drunk and uncooperative; 3) officers duty when they, through their affirmative conduct, expose a person to potential danger; 4) training regarding special dangers posed by the harsh Montana winters.

Lansdown v. Chadwick, 258 F.3d 754 (8th Cir. 2001)

Chadwick, who knew Lansdown knew that he had a history of mental illness and a propensity for violence. He had reason to believe that Lansdown owned weapons and was informed that he had stopped taking his medication. Chadwick observed Lansdown pour gasoline on areas of his property and light them on fire. When firefighters arrived he would not let them enter the house because there was a man with a gun inside. After about five minutes the firefighters received permission to start spraying the house with water. While trying to put out the fire they twice ripped crime scene tap, which led to a "turf war" between the firefighters and officers at the scene. One of the firefighters observed Lansdown through an open window and stated that they needed to get him out of there. An officer nearby replied, "No, let the F_ _Ker die." Thirty to forty minutes later Landsdown was pronounced dead from smoke inhalation.

The Appellate court agreed with the district court that "although the events of that day indicated a lack of professionalism on the part of those hired to serve the community, it did not rise to the level of a constitutional violation. Landsdown was wholly responsible for the situation that created the danger to his life."

McClendon v. City of Columbia, 258 F.3d 432 (5th Cir. 2001)

Loftin, a confidential informant, told Officer Carney that he was worried about the possibility of violence between himself and the plaintiff, McClendon, and he did not have a gun. Carney gave Loftin a gun from his desk that had been seized in a raid. Approximately one week later, Loftin shot McClendon in the face, permanently blinding him.

State-Created Danger:

"When State actors knowingly place a person in danger, the due process clause of the Constitution has been held to render them accountable for the foreseeable injuries that result from their conduct whether or not the victim was in formal state custody." The plaintiff must show that the state actors increased the danger and acted with deliberate indifference. Although the officer claimed that the gun used was never found and not the one he loaned Loftin, the court found sufficient evidence to support the proposition that Officer Carney gave Loftin a gun at a time when he knew or should have known that violence was close to erupting and at a time when he knew Loftin had no other gun in his possession. A reasonable trier of fact could find that the officer created a danger that Loftin would shoot McClendon and that he contributed to an opportunity for Loftin to commit a crime which otherwise might not have existed.

Municipal Claims:

Plaintiff's claim that the City's custom or policy of allowing evidence to be kept in the offices of individual officers failed because of a lack of evidence indicating a pattern of similar incidents in which citizens were injured or endangered or evidence of serious incompetence or misbehavior that was general or widespread throughout the police force. This was at best an isolated incident in violation of the unwritten city policy regarding storage of evidence. Plaintiff's claim regarding the city's failure to train its officers in the proper use of confidential informants, also failed. Plaintiff failed to provide evidence demonstrating that any training on behalf of the City with regard to the use of informants would have prevented Carney from providing Loftin with the gun.

Amos v. City of Page, Arizona, 257 F.3d 1086 (9th Cir. 2001)

Amos' car crossed the centerline colliding with an oncoming vehicle causing severe damage and serious injury to the operator of the other vehicle. When officers arrived, witnesses informed them that Amos had walked, stumbled or jogged into the desert. Officers halted the civilian search efforts, discovered blood inside his vehicle and began to track the footprints leading into the desert. They stopped their search when their flashlights lost power and the helicopter called to

assist abandoned its efforts due to concerns from nearby power lines. Officers did not resume their search in daylight, but rather waited for approximately five weeks until Amos' father expressed concerns about the whereabouts of his son. Subsequent searches were unsuccessful. Tourists found the remains almost three years after the accident.

State-Created Danger

The issue is whether the deficient police search was actionable under §1983 as a deprivation of substantive due process rights. After quickly dismissing any claim that Amos was in "de facto custody" because the police exercised geographic control, was rejected. The real question was whether the officers left Amos in a situation that was more dangerous than the one in which they found him. While the State may have been aware of the dangers Amos faced, it played no part in their creation nor did it do anything to render him any more vulnerable. The court distinguished this case from *Ross v. United States,* 910 F2d 1422 (7th Cir. 1990), where a sheriff prohibited two lifeguards, two firefighters, a police officer and two civilian scuba divers from attempting to rescue a 12-year-old boy, claiming they had to wait until authorized fire department divers arrived. In *Ross,* the child's location and risk of death were known and well equipped and trained rescuers were immediately available at the scene. In this case it was purely speculative as to whether a few passing motorists searching the immediate surroundings would have been successful.

Equal Protection Claim

The city attorney explained that Native Americans involved in car accidents often leave the scene, abscond to the reservation and call the police the following day to report their vehicle as stolen. This is so common that it is standard practice for the police not to conduct thorough searches for runaway drivers. Plaintiff's claim was that the city violated the equal protection clause by selectively withholding protective services from Amos because they believed he was a Native American. That Amos was actually white did not make the alleged discrimination with resulting injury less direct. Discrimination is no less malevolent because it was based upon an erroneous assumption. The court also remanded the claim that the city's training was inadequate.

Miscellaneous

Fontana v. Haskin, 262 F.3d 871 (9th Cir. 2001)

Plaintiff claims she was arrested for drunk driving and on the way to the station she was sexually harassed. Specifically she claims that the officer who sat next to her in the back seat told her she had nice legs, that he could be her older man, and put his arm around her, massaging her shoulders. At the police station he said he could help her in the rest room, she looked like the all American girl,

with light eyes, blond hair, the perfect body and nice legs, asked her if she had a boyfriend and tried to find out where she lived. The court denied the officer's motion for summary judgment, noting the Fourth Amendment prohibits unreasonable intrusion on one's bodily integrity. The constitutionality of police action during a seizure involves the balancing of the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing governmental interest at stake. Since there can be no countervailing governmental interest to justify sexual misconduct, if Fontana's complaint is true, her Fourth Amendment right would have been violated. "There is no situation that would justify any amount of purposeful sexual verbal and physical predation against a handcuffed arrestee.

Gritchen v. Collier, 254 F.3d 807 (9th Cir. 2001)

An officer brought a defamation action against a citizen for allegedly making a false internal affairs complaint about him, was then sued by the citizen who claimed that the officer's actions violated his First and Fourteenth Amendment rights. The court found that the plaintiff had failed to meet jurisdictional requirements since the officer's action was not taken under color of law. Defamation suits are quintessentially personal. The mere fact that there was an enabling statute allowing officers to bring such suits did not create a State action.

Helseth v. Burch, 258 F.3d 867 (8th Cir. 2001)

Shortly after midnight an intoxicated driver raced his car past an officer at a speed of 111 mph. The officer began pursuit, observing the fleeing vehicle run through stop signs and stoplights at 60 to 80 mph. A second officer, Burch, took over as lead squad car, following the driver through more stop signs before it stopped briefly at a dead-end before driving over lawns and a small retaining wall onto another street. Burch attempted "PIT" (Pursuit Intervention Tactics) causing the vehicle to spin around, cross the median and travel on a highway the wrong way. Another PIT maneuver again spun the vehicle now going in the correct direction. They accelerated to speeds of 80-100 mph, running a red light and colliding with a pickup truck, killing the passenger and leaving the plaintiff a quadriplegic. Three juveniles in the fleeing vehicle suffered serious physical injuries. The 8th Circuit overturned its decision in *Feist v. Simonson,* 222 F.3d 455 (2000) which declined to apply the *Intent to Harm Standard* in *County of Sacramento v. Lewis,* 523 US 833(1998) because the officer in that case had ample time to deliberate during a six-minute chase.

The 8th Circuit joined the l0th, 3rd, 9th, and 2nd Circuits' decisions to adhere to the Lewis standard, holding that "only a purpose to cause harm unrelated to a legitimate object of arrest will satisfy the element of arbitrary conduct shocking to the conscience necessary for a due process violation." In this case, the court found that Officer Burch's deliberate ramming of the fleeing suspect's car did not permit an inference of an attempt to harm. In fact, the PIT maneuvers failed to stop the vehicle. The court stated that the police officers that risked their lives to remove this menace from the public highways were not guilty of a "conscience shocking intent to harm."